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IN THE

Supreme Court of the United States

TERM, 1971

No. 71-5103

JOHN J. MORRISSEY and G. DONALD BOOHER,

Petitioners,

v.

LOU V. BREWER, WARDEN, et al.,

Respondents.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

PETITIONERS' REPLY BRIEF

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STATEMENT OF THE CASE

Petitioners' statement of these cases is set forth at pages 4-7 of Petitioners' Brief and Petitioners do not wish to make any addition thereto or corrections therein.

ARGUMENT

Petitioners' in this Reply Brief do not wish or intend to review or discuss the principal points and issues discussed in their initial brief. However, there are a limited number

of issues raised in Respondents Brief which were not discussed in Petitioners' Brief and to which Petitioners feel they must respond. Petitioner will not, therefore, discuss herein the various arguments set forth in Petitioners' Brief, but will comment only on points raised by Respondents' Brief and not fully covered in Petitioners' Brief.

A PAROLEE'S INTEREST REMAINING AT LIBERTY GREATLY OUTWEIGHS THE STATE'S IN SUMMARY PAROLE REVOCATION

In discussing the nature of the state interest involved in the parole revocation situation, the Respondents state at page 12 of Respondents' Brief that "the precise government interest involved is the welfare and security of society." At page 11 of their Brief, Respondents also state that "the safety, security and welfare of the citizens of the state far outweighs the interest of the parolee in remaining in a position of conditional liberty *pending determination of a parole violation*" (emphasis added). Finally, at page 13 of their Brief, Respondents, in discussing parole as a method of rehabilitation and correction, state that, *if* the conditions of parole are violated, the security and welfare of society require immediate reincarceration" (emphasis added). It is apparent to Petitioners from the above quoted portions of Respondents' Brief that Respondents are greatly concerned with the "welfare and security of society" and feel that the protection of society as a whole from parolees suspected of parole violations is a major, if not the primary, interest of the state to be considered in balancing the interests of the parolee as against the interest of the state in determining whether or not a revocation of parole can be constitutionally accomplished without first affording the parolee a hearing. While Respondents in other portions of their Brief also complain of an increase in the administrative burden which would be required by a hearing prior to revocation of parole and that the requirement of a hearing would have a detrimental effect on the rehabilitation process,

it is evident that Respondents are quite concerned with the protection of society from suspected parole violators. While Petitioners submit that the definition of the government interest as the "welfare and security of society" is hardly precise as is suggested by Respondents, Petitioners further submit that Respondents have incorrectly perceived the relevant interests which must be weighed as directed by this court in *Goldberg v. Kelly*. Petitioners agree with Respondents that *if* the conditions of parole have been violated *and* the Board of Parole has in its judgment determined that a parolee is not a good risk on the outside, reincarceration may be required. However, Petitioners submit that the "if" in the preceding sentence is critical and that they are entitled to a hearing prior to the determination of the fact of violation of their paroles. Finally, with respect to the above quoted portions of Respondents' Brief, and in particular the portion stating that the safety, security and welfare of the citizens of the state far outweighs the interest of the individual parolee *in remaining in a position of conditional liberty pending determination of the parole violation*, Petitioners submit that what is at issue in this case is not whether or not a parolee shall remain in a position of conditional liberty *pending determination of a parole violation*, but whether or not his conditional liberty as a parolee shall be revoked, requiring him to return to prison to serve the remainder of his sentence, without due process of law. If the only interest of the parolee which were involved in this case was the question of whether or not he should be imprisoned pending a determination of the fact of parole violation, Petitioners may well concede that the interests of society may outweigh his interest in remaining free during the relatively short period of time required to determine whether or not his parole had in fact been violated. This would be particularly true if it can be assumed that a parolee would not be arrested and incarcerated pending action concerning his parole unless reasonable cause to believe that a violation had occurred had been shown. As a matter of fact, both of Petitioners herein were arrested and confined

to county jails in Iowa during the period of time in which the Iowa Board of Parole was considering the revocation of their respective paroles. Petitioner Morrissey was arrested and held in the Linn County, Iowa Jail for approximately seven days awaiting action by the parole board with respect to the revocation of his parole. (A. 30, 65-69) Petitioner Booher was arrested and confined in the O'Brien County, Iowa Jail for approximately sixteen days waiting for the Iowa Board of Parole to determine whether or not to revoke his parole. (A. 109-10) Petitioners have not specifically complained about this period of confinement *pending determination of a parole violation.* Petitioners do, however, complain that their paroles were revoked and that they were ordered to return to the state penitentiary to serve out the remainder of their respective sentences, without having been granted a prior hearing before the Board of Parole.

THERE IS NO EVIDENCE IN THE RECORD IN THESE CASES WITH RESPECT TO THE ALLEGED PRACTICE OF THE IOWA BOARD OF PAROLE IN GRANTING POST-REVOCATION "HEARINGS" OR WITH RESPECT TO WHETHER OR NOT ANY SUCH "HEARING" WAS GRANTED TO EITHER OF THE PETITIONERS HEREIN.

Respondents devote a considerable portion of their Brief, particularly on pages 16 through 20 thereof, discussing the alleged practice of the Iowa Board of Parole regarding parole revocations. Respondents state in substance that the initial determination to revoke a parole is made by an independent vote of the three Iowa Board of Parole members based solely on the information in the parole agent's written report, and that if this determination is to revoke, the parolee is returned to the penitentiary to commence serving the remainder of his sentence. Respondents further state that it is the practice of the Board of Parole to then conduct a "hearing" at the penitentiary at which time the parolee is given an opportunity to "orally present his side

of the story to the Board." Respondents further allege at page 18 of their Brief that Petitioners Morrissey and Booher were given hearings before the Board of Parole after their paroles were revoked and they were reincarcerated in the Iowa State Penitentiary. In addition, Respondents make several references to statistical information regarding the number of returnees who have, at this post-revocation "hearing," denied the parole violations alleged in the parole agent's report. In various footnotes of Respondents' Brief, Respondents attribute this statistical information and all of the information concerning the general procedural operation of the Iowa Board of Parole, as well as the application of this alleged procedure to Petitioners herein, to interviews with Mr. Jack Beddel and Mr. George L. Paul, members of the Iowa Board of Parole. All of this information concerning the statistics relating to parole revocations and the procedural operation of the Iowa Board of Parole is entirely outside the record in these cases. None of this information was submitted to the District Court below nor was any of this information submitted in any form whatsoever to the United States Court of Appeals for the Eighth Circuit in the cases below. In addition to being completely outside of the record, Petitioners submit that such allegations are subject to question since they appear to be based solely upon the recollection of the Board of Parole members interviewed, as opposed to based upon any statistical records kept by the Board of Parole. In addition, the alleged practice of the Board of Parole regarding post-revocation "hearings" does not appear to have any statutory basis nor any basis in any regulations or rules promulgated by the Board of Parole or any other body in the government of the State of Iowa. Further, this "evidence" is subject to question as to its credibility for the reasons that it is derived from persons who are vitally interested in the outcome of these cases, is not sworn to and has not been tested by cross-examination, as would normally be the case with oral testimony such as that obtained from an interview with an interested party. Finally, the accuracy of certain statements attributed to Mr.

Beddell and Mr. Paul to the effect that only three returnees have denied alleged parole violations since July, 1969, that only ten returnees have denied parole violations since January, 1964, and that neither Petitioner Booher nor Petitioner Morrissey were among those who have denied alleged violations, are subject to question on the basis of the evidence that is in the record before this Court. First, there is no evidence in the record now before this Court other than the parole agent's report, which indicates that the Petitioners either admitted or denied that they had violated their paroles. As explained in a subsequent portion of this Brief, the statement by Respondents that both Petitioners Morrissey and Booher admitted all of the alleged parole violations is not accurate, particularly in view of the mitigating circumstances and explanations given by Morrissey and Booher in connection with the alleged violation of their parole conditions.

Therefore, because the allegations concerning the alleged practice of the Iowa Board of Parole in conducting a "hearing" are wholly outside of the record in this case and because the substance of such allegations is subject to question as pointed out herein, Petitioners believe that this Court should not rely on and should disregard the allegations in Respondents' Brief concerning such an alleged post revocation "hearing," both as a general practice of the Board of Parole and as it relates to these cases.

Even though Petitioners consider these allegations unsupported by the record herein, Petitioners take this opportunity to point out to the Court some significant aspects of these allegations if they were, in fact, true. For example, the second paragraph of Division IV of Respondents' Argument, beginning on page 16 of Respondents' Brief and continuing on page 17 thereof, clearly indicates the lack of procedural due process afforded parolees in the State of Iowa, prior to the entry of orders of the Iowa Board of Parole, revoking their paroles. Apparently, the sole information available to the parole board members at the time they made their decisions to revoke the paroles of Petitioners herein was the

written report of the parole agent, copies of which are found at pages 65-69 and 105-108 of the Appendix herein. In addition, the parole board members did not apparently even consult with each other concerning the decision to revoke but, after reading the parole agent's report merely, mailed their individual decision to the Chief Parole Officer who tallies the votes and then apparently processes the order revoking parole and ordering the parolee returned to the penitentiary.

It is further interesting to note from the statistics provided in Respondents' Brief that since July 1969, only three parolees whose paroles have been revoked have denied that they have in fact violated their parole and since January of 1964, only ten parolees whose paroles have been revoked have denied in fact violating their paroles. While Petitioners challenge these statistics as outside of the record herein and not, for the reasons stated above, reliable, if these statistics were approximately accurate, it appears that the administrative burden upon the Iowa Board of Parole to provide a hearing with due process procedural requirements would not be a large administrative burden inasmuch as approximately only one such hearing would be held each year. Finally, with respect to the statistics provided in Respondents' Brief, Respondents apparently, and for the first time on this appeal, place considerable reliance upon the purported or alleged post-revocation "hearing" held at the penitentiary after the parolee has been returned to the penitentiary and reincarcerated. They apparently are seeking to lead this Court to believe that the actual and final decision to revoke parole is not made prior to the time the order revoking parole is entered, but that the order revoking parole is entered solely for the purposes of obtaining immediate reincarceration, for the security and welfare of society, and that, in fact, a meaningful hearing is held at a later time. However, the statistics cited by Respondents in their Brief indicate that there are approximately 160 paroles revoked each year in the State of Iowa. This would result in approximately 540 parole revocations since July of 1969, and yet, it should be

noted that Respondents' statistics indicate that the initial revocation decision was reaffirmed in all but one of the revocations since July of 1969. For all practical purposes, then, the initial revocation decision, made without granting the parolee a hearing, is the final decision of the Iowa Board of Parole.

THE RECORD HEREIN DOES NOT SUPPORT RESPONDENTS' STATEMENT THAT PETITIONERS HAVE ADMITTED ALL OF THE ALLEGED VIOLATIONS OF THEIR PAROLE

Respondents' Brief, at page 15 thereof, states that both Petitioners Morrissey and Booher were each accused of three instances of parole violations and that each were advised of and admitted all three violations, and that further, neither Morrissey nor Booher have ever denied committing the alleged violations. Respondents conclude, therefore, that the fact of violation was firmly established in each of the cases at bar and that, therefore, there was no controversy over whether or not Petitioners committed the alleged violations, and that no hearing was therefore required. Further, by way of footnote #5 on page 15 of Respondents' Brief and footnote #9 on page 20 of Respondents' Brief, Respondents state that, according to the recollection of Parole Board members Jack Beddel, in the case of Booher, and of Parole Board member George L. Paul, in the case of Morrissey, neither Booher nor Morrissey denied the alleged parole violations at the time of the alleged "hearing" which took place after their parole revocation and reincarceration in the Iowa State Penitentiary. Respondents also stated on page 20 of their Brief that both Petitioners Morrissey and Booher were advised of their parole violations and admitted the same prior to the revocation and that they were again advised of their alleged parole violations and admitted the same at the time of the alleged "hearing" at the Iowa State Penitentiary. In support of their allegations that Petitioners Morrissey and Booher admitted violations of their parole,

written report of the parole agent, copies of which are found at pages 65-69 and 105-108 of the Appendix herein. In addition, the parole board members did not apparently even consult with each other concerning the decision to revoke but, after reading the parole agent's report merely mailed their individual decision to the Chief Parole Officer who tallies the votes and then apparently processes the order revoking parole and ordering the parolee returned to the penitentiary.

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Respondents cite only the written report of violation prepared by the parole agents in charge of supervising the parole of the respective Petitioners, and information obtained from an interview with Parole Board members Beddel and Paul.

As is indicated elsewhere in this Brief, the information obtained in the interviews from Board members Beddel and Paul is entirely outside of the record in this case and is subject to question in view of the fact that it appears to be based only on recollection and an apparent failure of either board members Beddel or Paul to recall specifically the cases of Booher or Morrissey, since the statements attributed to each of said Board members is solely that during their term of office as Board of Parole members only a small number of persons have denied alleged parole violations and that the Petitioners herein were not among those who had denied the alleged violations. Apparently the Board members Beddel and Paul could not state that either Booher or Morrissey denied the alleged violations, but only that they were not in that group of persons that Messrs. Beddel and Paul could remember having denied the alleged parole violations.

An examination of the record in these cases will indicate that an unqualified statement that both Petitioner Morrissey and Petitioner Booher admitted all of the alleged parole violations, is not supported by the evidence in this case. First, the only evidence in this record relating to the alleged parole violations is the Report of Violation prepared by the parole agent supervising the paroles of the respective Petitioners. The Report of Violation concerning Petitioner Morrissey is found at pages 65-69 of the record herein and contains many statements by the parole officer concerning information obtained by him through various hearsay sources. Said report alleges that Petitioner Morrissey violated three parole rules. The first rule is that the parolee is to find a rooming place which would be approved by the parole agent on his first visit, and that he will immediately report any change of rooming place to the Chief Parole Officer, which shall

be subject to approval by the parole agent on his next visit. Secondly, Morrissey is alleged to have violated the rule stating that he will in all respects conduct himself honestly, avoiding questionable associates, obeying the law, keeping reasonable hours, avoiding all places of questionable reputations and taverns, and consulting his parole agent before incurring indebtedness. Thirdly, Morrissey is alleged to have violated the rule prohibiting ownership or operation of a motor vehicle without the written consent of the Chief Parole Officer.

An examination of the parole agent's report shows, in the section entitled "Parolee's version of the offenses," that Morrissey could give no explanation as to why he failed to contact the parole agent from January 10, 1969, through January 24, 1969. The report, however, indicates that Morrissey claimed that he had been sick from January 13, 1969, to January 18, 1969, and that that was the reason he had missed work during that period of time. Morrissey also, according to the parole agent's report, stated that his doctor advised him that he did not have to call his employer to inform him that he was sick, but that the doctor would submit a note to the employer concerning the illness. Thus, as opposed to admitting, without qualification, that he violated conditions of his parole, Morrissey had, in connection with the matter of having failed to report to the parole agent for a period of two weeks, stated that he had been sick and under a doctor's care and that his doctor had agreed to give him a note about his illness for his employer. Further, according to the parole officer's report, Petitioner Morrissey admitted that he had bought furniture at the Becker Furniture Store under the name of D. Leo Morrissey and that he had signed an agreement (apparently a purchase agreement) in that name. Petitioner Morrissey, however, stated to the parole agent upon questioning that he did not remember picking up the furniture at the store and thought that it was still in the store, or that he did not know where the furniture was. Thus, the Petitioner apparently admitted

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only that he had signed a purchase agreement in the name of D. Leo Morrissey, but did not admit that he had picked up the furniture, and further stated that he did not know where the furniture was.

In view of the limited nature of the admissions reported by the parole agent in his written report and further in view of the mitigating circumstances and explanations given by Petitioner Morrissey concerning a portion of the alleged violations, it can hardly be said unequivocably that the Petitioner Morrissey admitted all of the alleged parole violations with which he was charged.

The Report of Violation prepared by Petitioner Booher's parole agent appears at pages 105-108 of the Appendix herein. An examination of that report will show that the parole agent recommended revocation of Petitioner Booher's parole based upon the violation of three parole rules. First, the Petitioner is reported to have violated the rule requiring that he will remain in supervised employment unless he obtains written consent from the Chief Parole Officer to change therefrom, and agrees to keep himself gainfully employed during his parole period. Secondly, he is alleged to have violated the rule prohibiting him from going beyond the territorial limits of O'Brien County without the written consent of the Chief Parole Officer. Finally, he is charged with violating the rule prohibiting him from owning or operating a motor vehicle without the written consent of the Chief Parole Officer.

As in the case of the written Report of Violation concerning Petitioner Morrissey, the report concerning Petitioner Booher contains many statements outside the personal knowledge of the parole agent and in connection with which he apparently relied upon hearsay statements from other persons. In connection with the alleged violation concerning his employment, the parole agent's written report indicates that the agent and Petitioner Booher had conversations concerning the obtaining of employment during which the Petitioner expressed dissatisfaction with the rate of pay

he could get. In addition, Petitioner apparently admitted to the parole agent that during one period of time he had been working for Iowa Beef Packers, in Dakota City, Nebraska. There are no other statements in the parole officer's report attributable to the Petitioner concerning his employment. Even though there is a reference to the fact that Petitioner had previously lost employment at two places due to his temper, these references apparently relate to instances occurring approximately eight months prior to the parole agent's report and did not comprise a basis of the alleged violations pursuant to which the Petitioner's parole was revoked. It can hardly be said that the Report of Violation shows an admission on the part of Booher, that he violated the terms of his parole.

With respect to the charge that the Petitioner had left the territorial boundaries of O'Brien County, Iowa, the only statements in the parole agent's report attributable to Petitioner concerning the Petitioner's absence from O'Brien County related to his statement that he had been working in Dakota City, Nebraska, and that he had been in Mt. Pleasant, Iowa. Since Petitioner was arrested in O'Brien County, however, it is apparent that his absence from the county was only temporary. The report contains no information concerning the reason why the Petitioner had been in Mt. Pleasant, Iowa, and in this respect, it should be noted that during the time in which the alleged violations occurred, the Petitioner's parole officer was on vacation and possibly unavailable for obtaining of permission to leave the county. Finally, although the statement is not attributable to the Petitioner, there is an indication that during this period of time the Petitioner's wife had gone to Iowa City, Iowa, to the hospital there to have a baby. The report does not indicate whether or not the Petitioner also went to Iowa City, although the parole agent reports that the Petitioner stated that the fact that his wife was in the hospital, and that he had been denied a transfer to the State of Minnesota, were reasons given by the Petitioner to explain his actions. While the report

states that the Petitioner did admit that he had continued to operate a motor vehicle, apparently the motor vehicle licensed in his wife's name, the report does not support the statement in Respondents' Brief that the Petitioner admitted all alleged violations of his parole. Finally, it is true that Petitioners state in their Brief in chief that a lengthy or involved fact-finding hearing would not seem to be necessary in those cases in which a violation of parole condition is established by either voluntary admission by a parolee or by conviction of a parolee of a separate criminal offense. Petitioners submit that they should not be denied the opportunity of a hearing to which they would otherwise be constitutionally entitled, on the basis of the limited types of admissions attributed to them in the parole agents' reports which are a part of the record in this case. Certainly, before a parolee should be held to have waived his right to a hearing on the basis of voluntary admission of a parole violation, it should be ascertained that the purported admission was voluntarily made and with the full knowledge of the consequences of said admission. In addition, Petitioners submit that in order to establish a waiver of a constitutional right to a hearing prior to revocation of parole, the admission of the alleged parole violations should be in writing and submitted to the board of parole, and the board, in determining that Petitioner has waived his right to a fact-finding hearing to establish parole violation, should do so only upon the written admission of the parolee.

Respectfully submitted,

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NOTE: Where it is deemed desirable, a syllabus (headnote) will be released, as is being done in connection with this case, at the time the opinion is issued. The syllabus constitutes no part of the opinion of the Court but has been prepared by the Reporter of Decisions for the convenience of the reader. See *United States* v. *Detroit Lumber Co.*, 200 U.S. 321, 337.

SUPREME COURT OF THE UNITED STATES

Syllabus

MORRISSEY ET AL. *v.* BREWER, WARDEN

CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

No. 71-5103. Argued April 11, 1972—Decided June 29, 1972

Petitioners in these habeas corpus proceedings claimed that their paroles were revoked without a hearing and that they were thereby deprived of due process. The Court of Appeals, in affirming the District Court's denial of relief, reasoned that under controlling authorities parole is only "a correctional device authorizing service of sentence outside a penitentiary," and concluded that a parolee, who is still "in custody," is not entitled to a full adversary hearing such as would be mandated in a criminal proceeding. *Held:*

1. Though parole revocation does not call for the full panoply of rights due a defendant in a criminal proceeding, a parolee's liberty involves significant values within the protection of the Due Process Clause of the Fourteenth Amendment, and termination of that liberty requires an informal hearing to give assurance that the finding of a parole violation is based on verified facts to support the revocation. Pp. 9–11.

2. Due process requires a reasonably prompt informal inquiry conducted by an impartial hearing officer near the place of the alleged parole violation or arrest to determine if there is reasonable ground to believe that the arrested parolee has violated a parole condition. The parolee should receive prior notice of the inquiry, its purpose, and the alleged violations. The parolee may present relevant information and (absent security considerations) question adverse informants. The hearing officer shall digest the evidence on probable cause and state the reasons for holding the parolee for the parole board's decision. Pp. 13–16.

3. At the revocation hearing, which must be conducted reasonably soon after the parolee's arrest, minimum due process requirements are: (a) written notice of the claimed violations of parole; (b) disclosure to the parolee of evidence against him; (c) opportunity to be heard in person and to present witnesses and doc-

Syllabus

umentary evidence; (d) the right to confront and cross-examine adverse witnesses (unless the hearing officer specifically finds good cause for not allowing confrontation); (e) a "neutral and detached" hearing body such as a traditional parole board, members of which need not be judicial officers or lawyers; and (f) a written statement by the factfinders as to the evidence relied on and reasons for revoking parole. Pp. 16–19.

443 F. 2d 942, reversed and remanded.

BURGER, C. J., delivered the opinion of the Court, in which STEWART, WHITE, BLACKMUN, POWELL, and REHNQUIST, JJ., joined. BRENNAN, J., filed an opinion concurring in the result, in which MARSHALL, J., joined. DOUGLAS, J., filed an opinion dissenting in part.

SUPREME COURT OF THE UNITED STATES

No. 71-5103

John J. Morrissey and G. Donald Booher, Petitioners, v. Lou B. Brewer, Warden, et al. | On Writ of Certiorari to the United States Court of Appeals for the Eighth Circuit.

[June 29, 1972]

MR. CHIEF JUSTICE BURGER delivered the opinion of the Court.

We granted certiorari in this case to determine whether the Due Process Clause of the Fourteenth Amendment requires that a State afford an individual some opportunity to be heard prior to revoking his parole.

Petitioner Morrissey was convicted of false drawing or uttering of checks in 1967 pursuant to his guilty plea, and was sentenced to not more than seven years' confinement. He was paroled from the Iowa State Penitentiary in June 1968. Seven months later, at the direction of his parole officer, he was arrested in his home town as a parole violator and incarcerated in the county jail. One week later, after review of the parole officer's written report, the Iowa Board of Parole revoked Morrissey's parole and he was returned to the penitentiary located about 100 miles from his home. Petitioner asserts he received no hearing prior to revocation of his parole.

The parole officer's report on which the Board of Parole acted shows that petitioner's parole was revoked on the basis of information that he had violated the conditions of parole by buying a car under an assumed name and operating it without permission, giving false statements to police concerning his address and insur-

ance company after a minor accident, and obtaining credit under an assumed name and failing to report his place of residence to his parole officer. The report states that the officer interviewed Morrissey, and that he could not explain why he did not contact his parole officer despite his effort to excuse this on the ground that he had been sick. Further, the report asserts that Morrissey admitted buying the car and obtaining credit under an assumed name and also admitted being involved in the accident. The parole officer recommended that his parole be revoked because of "his continual violating of his parole rules."

The situation as to petitioner Booher is much the same. Pursuant to his guilty plea, Booher was convicted of forgery in 1966 and sentenced to a maximum term of 10 years. He was paroled November 14, 1968. In August 1969, at his parole officer's direction, he was arrested in his home town for a violation of his parole and confined in the county jail several miles away. On September 13, 1969, on the basis of a written report by his parole officer, the Iowa Board of Parole revoked Booher's parole and Booher was recommitted to the state penitentiary, located about 250 miles from his home, to complete service of his sentence. Petitioner asserts he received no hearing prior to revocation of his parole.

The parole officer's report with respect to Booher recommended that his parole be revoked because he had violated the territorial restrictions of his parole without consent, had obtained a driver's license under an assumed name and operated a motor vehicle without permission, and had violated the employment condition of his parole by failing to keep himself in gainful employment. The report stated that the officer had interviewed Booher and that he had acknowledged to the parole officer that he had left the specified territorial limits and had oper-

ated the car and had obtained a license under an assumed name "knowing that it was wrong." The report further noted that Booher had stated that he had not found employment because he could not find work that would pay him what he wanted—he stated he would not work for $2.25 to $2.75 per hour—and that he had left the area to get work in another city.

After exhausting state remedies, both petitioners filed habeas corpus petitions in the United States District Court for the Southern District of Iowa alleging that they had been denied due process because their paroles had been revoked without a hearing. The State responded by arguing that no hearing was required. The District Court held on the basis of controlling authority that the State's failure to accord a hearing prior to parole revocation did not violate due process. On appeal, the two cases were consolidated.

The Court of Appeals, dividing 4 to 3, held that due process does not require a hearing. The majority recognized that the traditional view of parole as a privilege rather than a vested right is no longer dispositive as to whether due process is applicable; however, on a balancing of the competing interests involved, it concluded that no hearing is required. The court reasoned that parole is only "a correctional device authorizing service of sentence outside the penitentiary"; the parolee is still "in custody." Accordingly, the Court of Appeals was of the view that prison officials must have large discretion in making revocation determinations, and that courts should retain their traditional reluctance to interfere with disciplinary matters properly under the control of state prison authorities. The majority expressed the view that "non-legal, non-adversary considerations" were often the determinative factors in making a parole revocation decision. It expressed concern that if adversary hearings were required for parole revocation, "with the full panoply of rights accorded in

criminal proceedings," the function of the parole board as "an administrative body acting in the role of *parens patriae* would be aborted" and the board would be more reluctant to grant parole in the first instance—an apprehension that would not be without some basis if the choice were between a full scale adversary proceeding or no hearing at all. Additionally, the majority reasoned that the parolee has no statutory right to remain on parole. Iowa law provides that a parolee may be returned to the institution at any time. Our holding in *Mempa* v. *Rhay*, 389 U. S. 128 (1967), was distinguished on the ground that it involved deferred sentencing upon probation revocation, and thus involved a stage of the criminal proceeding, whereas parole revocation was not a stage in the criminal proceedings. The Court of Appeals' decision was consistent with many other decisions on parole revocations.

In its brief in this Court, the State asserts for the first time that petitioners were in fact granted hearings after they were returned to the penitentiary. More generally, the State says that within two months after the Board revokes an individual's parole and orders him returned to the penitentiary, on the basis of the parole officer's written report, it grants the individual a hearing before the Board. At that time the Board goes over "each of the alleged parole violations with the returnee, and he is given an opportunity to orally present his side of the story to the Board." If the returnee denies the report, it is the practice of the Board to conduct a further investigation before making a final determination either affirming the initial revocation, modifying it, or reversing it.[1] The State asserts that Morrissey, whose parole

[1] The hearing required by due process, as defined herein, must be accorded *before* the effective decision. *See Armstrong* v. *Manzo*, 380 U. S. 545 (1965). Petitioner asserts here that only one of the

was revoked on January 31, 1969, was granted a hearing before the Board on February 12, 1969. Booher's parole was revoked on September 13, 1969, and he was granted a hearing on October 14, 1969. At these hearings, the State tells us—in the briefs—both Morrissey and Booher admitted the violations alleged in the parole violation reports.

Nothing in the record supplied to this Court indicates that the State claimed, either in the District Court or the Court of Appeals, that petitioners had received hearings promptly after their paroles were revoked, or that in such hearing they admitted the violations; that information comes to us only in the State's brief here. Further, even the assertions that the State makes here are not based on any public record but on interviews with two of the members of the parole board. In the interview relied on to show that petitioners admitted their violations, the board member did not assert he could remember that both Morrissey and Booher admitted the parole violations with which they were charged. He stated only that, according to his memory, in the previous several years all but three returnees had admitted commission of the parole infractions alleged and that neither of the petitioners was among the three who denied them.

We must therefore treat this case in the posture and on the record the State elected to rely on in the District Court and the Court of Appeals. If the facts are otherwise, the State may make a showing in the District Court that petitioners in fact have admitted the violations charged before a neutral officer.

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540 revocations ordered most recently by the Iowa Parole Board was reversed after hearing. Petitioner's Reply Brief, at 7, suggesting that the hearing may not objectively evaluate the revocation decision.